

TANZANIA / JUDGMENT

simply fresh t ltd vs kevin stander 2 others

2022 tzhccomd 362 25 november 2022

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IN THE HIGH COURT OF TANZANIA (COMMERCIAL DIVISION) AT DAR ES SALAAM
COMMERCIAL CASE NO. 34 OF 2022 SIMPLY FRESH (T)
LIMITED..... PLAINTIFF VERSUS KEVIN STANDER.....
1ST DEFENDANT YASMINE HAJI..... 2ND DEFENDANT SHANTA RETAIL
HOLDING LTD..... 3RD DEFENDANT Date of Last Order:06.10.2022 Date of
Judgement:25.11.2022

JUDGEMENT

MAGOIGA, J. The plaintiff, SIMPLY FRESH (T) LIMITED by way of a plaint instituted the instant suit against the above named defendants praying for this court be pleased to enter judgement and decree in the following orders, namely:-

- i. Declaration that the 1st, 2nd and 3rd defendants have derogated and breached their financial obligations; ii. Judgement and decree against the 1st, 2nd and 3rd defendants ordering them to meet their respective obligations towards discharging financial liabilities. The said liabilities are i USD.2,097,810.67 for the 1st defendant, USD.2,097,810.67 for the 2nd defendant and USD.4,185,621.35 for the 3rd defendant; iii. Interest on the decretal sum at court's rate of 7% from the date of judgement until payment in full; iv. Costs of the suit;
- v. Any other order the Hon. Court will deem just and fit to grant. Upon being served with the plaint, the 1st and 3rd defendants opted to settle the matter out of court, and indeed, a Deed of Settlement duly executed by parties was filed in this court on 29th day of April, 2022. The same was recorded on 10.05.2022 and consent judgement and decree was accordingly issued. On the part of the 2nd defendant, she filed written statement of defence disputing the plaintiff's claims by inviting the plaintiff into strict proof of his claims and consequently invited this court to dismiss this suit with costs and interests. At this juncture, it is apposite for better understanding of the gist of this suit to state albeit in brief. It is alleged that the plaintiff upon being set up was relatively with sound financial footing but later on encountered financial challenges necessitating the plaintiff to borrow from various

institutions and 2 individuals. Facts go that, by 31st December, 2019, the total financial liabilities facing the plaintiff was USD.8,371,243.00 which was in the knowledge of both shareholders and directors. In the circumstances, on 20th January, 2020, the plaintiff resolved that the said liabilities be shared by the 1st, 2nd and 3rd defendants as shareholders by paying USD.2,097,810.67, USD.2,097,810.67 and USD.4,185,621.35 respectively among the defendants. It was further agreed that, the same be paid within two years commencing January, 2020 to December, 2021. Nevertheless, the defendants failed to honour their respective obligations, necessitating the institution of this suit, hence, this judgement. • As earlier noted, the 1st and 3rd defendants settled the suit with the plaintiff, hence, this trial is against the 2nd defendant alone which was done without amending the plaint. The plaintiff at all material time in these proceedings has been enjoying the legal services of Mr. Joseph Kipeche, learned advocate whereas the 2nd defendant has been enjoying the legal services of Messrs. Jovinson Kagilwa and Simon Lyimo, learned advocates. During final pre trial conference, the following issues were framed, recorded and agreed between parties for the determination of this suit, namely:- 3

1. Whether the 2nd defendant has derogated and breached her financial repayment obligations that have been incurred by the plaintiff?;
2. If the answer to issue number one is in the affirmative, whether the 2nd defendant is liable to pay and to what extent?
3. To what reliefs parties are entitled to?. In proof of the plaintiff's case the plaintiff called two witnesses. The first witness for the plaintiff was KETANKUMAR VINUBHAI PATEL (to be referred in these proceedings as "PW1"). PW1 through his written witness statement under affirmation told the court that he is one of the directors of the plaintiff together with Kevin Stander and Maheshkumar Raojibhai Patel. According to PW1, the plaintiff was registered on 10th August, 2011 and currently operates supermarket at Masaki. PW1 told the court that the plaintiff have 3 shareholders who are Kevin Stander holding 25 shares, Yasmine Haji with 25 shares and Shanta Retail Holding Ltd with 50 shares. Further testimony of PW1 was that, in 2015 various institutions and individuals provided funds and services to the plaintiff with full knowledge and assent of the shareholders and directors thereof as working capital of the plaintiff and that by 31st December, 2019, the total liabilities stood at 4 USD.8,371,243.00 showing the names of institutions and individuals and their respective amount due on each. PW1 went on telling the court that, on 20th January, 2020 the plaintiff's shareholders resolved that the said liabilities be shared among the shareholders (who are 1st, 2nd and 3rd defendants) according to their percentage of shares owned by each and the said amount allocated to each shareholder be paid within two years commencing on January 2020 to December, 2021. PW1 insisted that all shareholders were aware of the said meeting and the 2nd defendant through phone few minutes notified other shareholders that she could not attend the meeting as she had encountered some other matters to attend and allowed them to proceed, record resolution and was notified of the resolution. Not only that but also that, there were regular meetings which shareholders agreed to share the liabilities. PW1 pointed

out that, the 1st and 2nd defendants shares were 25 each, hence, each was to pay USD.2,097,810.67 and the 3rd defendant was to pay USD.4,185,621.35. PW1 testified that because the 2nd defendant has not bothered to pay her share liability, prayed that this court be pleased to grant the prayers as contained in the plaint against the 2nd defendant. 5 In proof of the case for the plaintiff, PW1 tendered in evidence the following exhibits, namely:- .

1. Plaintiff's board resolution dated 20.01.2022 as exhibit P1;
2. Statement of account of shareholders of the plaintiff as exhibit P2; Under cross examination by Mr. Kagilwa, PW1 admitted that, the plaintiff is a private limited liability company and is governed by Memarts. Pressed with question, PW1 told the court that he did not tender the Memarts. According to PW1, the basis of plaintiff's claims is exhibit P1 and an email which was not tendered. Pressed with more questions, PW1 told the court that the meeting was called by company secretary, one, Gurumuty Malinghem but was not sure who moved to call the meeting. PW1 when shown exhibit P1, told the court that, the meeting was extra ordinary general meeting and the company secretary has the powers to call such meeting. PW1 admitted that, he personally never invited the 2nd defendant. In this case, PW1 admitted there was no such resolution to have such a meeting. PW1 when shown exhibit P2 told the court that it was prepared by company accountant in 2019. PW1 insisted the liabilities were shared based on 6 shareholding structures. PW1 admitted to have no shareholding agreement for such arrangement to pay. PW1 further pressed with questions admitted that, no notice of meeting was tendered in this court and that he is the shareholder of the 3rd defendant. PW1 pressed with questions admitted as well that there is not specific resolution for filing this case. Mr. Kipeche had nothing to re-examine PW1. Next witness for the plaintiff was KEVIN STANDER (to be referred in these proceedings as "PW2"). Under oath and through his written witness statement, PW1 told the court that he is the shareholder and director of the plaintiff. The rest of the testimony of PW2 is the same as that of PW1, which I find no reason to repeat them herein. PW2 tendered no documentary evidence in these proceedings. Under cross examination by Mr. Kagilwa, PW2 told the court that he is not aware if the 2nd defendant shares are paid up or not. Pressed with question, PW2 admitted that no document was tendered to prove the 2nd defendant consented to the borrowing in dispute. More pressed with questions, PW2 admitted that the company has audited accounts but were not tendered in this suit and that he invited the 2nd defendant to the meeting. 7 PW2 was shown exhibit P2 and stated that Patel (PW1) is the shareholder of 3rd defendant and the money showed there were loaned against himself. PW2 told the court that Mahesh Patel loaned money to the plaintiff. Lastly, PW2 admitted that he is not aware of the basis of distribution of the share liabilities. Under re-examination by Mr. Kipeche, PW2 told the court that Gurumuty Malinghem is no longer working with the plaintiff. This marked the end of hearing of the plaintiff's case and same was marked closed. The 2nd defendant, YASMINE HAJI fended herself via video conference and through her written witness statement adopted in these proceeding as her testimony in chief. DW1 is to be referred as DW1 in these proceedings. DW1 under oath told the court that she is the shareholder of the

plaintiff and former director but she resigned in 2020. DWI told the court that to her best knowledge, the plaintiff was availed with bank facilities by Bank M vide a letter of offer dated 17th August 2017 which constituted two overdraft facilities and two terms loans which were capped to the maximum of USD.1,992,277.55 and TShs.1,350,000,000.00. According to 8. I DWI, the said credits were secured by first legal mortgage over the lease rights on plot No.1870 Osterbay area, Dar es Salaam city with C.T. No.23371 registered in the name of Pius Paul Mbawala leased to the 1st defendant, Debenture charge over all fixed and floating assets of the plaintiff and personal guarantees of the directors. DWI went on telling the court that, out of that guarantee, the granted facilities were, namely:

- a. Overdraft facility of TShs. 1,100,000,000.00;
- b. Temporal Overdraft Facility of Tshs.250,000,000.00;
- c. Term loan of USD.25,000.00;
- d. Term Loan of USD.2,000,000.00 DWI further told the court that, the above facilities were all discharged by plaintiff as confirmed in paragraph 16, 17, 20, 21, 22, 23 and 25 of the plaint in Commercial Case No.76 of 2020 and in paragraph 13 and 14 of the witness statement. DWI went on telling the court that, the instant suit is re-engineered and re-litigated by Ketankumar Patel and Maheshkumar Patel who are shareholders of the plaintiff for their own ill will. 9 DWI denied to have been invited to the meeting of shareholders because same must be preceded by notice of shareholders which is required to be served to all shareholders 30 days prior to the intended meeting. DWI pointed out that, there was no notice of liability of the plaintiff and that since her shares are paid up she has no personal and individual obligation towards the liabilities of the plaintiff which is separate entity. Not only that but DWI testified that since her resignation from directorship in 2020, she has never been informed of any acts of default of the credit facilities of the plaintiff or received any demand or letter recalling the facilities from any bank or any third parties. Further testimony of DWI was that, powers of relationship of shareholders are governed by the Articles of Association of the plaintiff and the law governing companies in Tanzania. On that note, DWI told the court there is no power or mandate of one shareholder or more than one shareholder to shift or impose liability to another shareholder. DWI went on telling the court that looking at exhibit P2 which is the basis of the claims in this suit has nothing to do with the her because most of the monies raised there are by Export Trading Group which is owned by Patel brothers and are the one appearing in the extra general meeting of the 10 plaintiff covering USD.5,309,017 and another claim of USD.2,952,784.00 are from Glass and Glazing which has nothing to do with the plaintiff but with Patel brothers. It was, therefore, the testimony of DWI that, any payment of whatsoever nature, alleged to have been done by the 1st and 3rd defendants have nothing to do with relationship of 2017 credit facilities. According to DWI, this makes the whole claim by the plaintiff astounding and malicious. On that note, the 2nd defendant invited this court to dismiss this suit with costs. DWI tendered no documentary evidence in support of her defence. Under cross examination by Mr. Kipeche, DWI admitted that in her defence she said nothing in respect of paragraphs 9 and

10 of the plaint on resolution to pay the liability but seriously dispute the claim of USD.2,097,810.67 by the plaintiff. Pressed with questions, DWI told the court that, Mr. Patel and Stander have been threatening her through phones but she couldn't report to police and is one of the reasons why she resigned from directorship of the plaintiff. ii i Under re-examination by Mr. Kagilwa, DWI told the court that she seriously dispute paragraphs 9 and 10 because no demands were issued to her or to the company. According to DWI, the money, if any, was transferred to the company by Patel and it is him who is supposed to pay. DWI insisted the loan in issue do not exist and no notice was send to her. This marked the end of hearing of defence case and same was marked closed. At the closure of the parties' respective case, the learned advocates for parties' prayed for leave to file final closing submissions. I granted the prayer. I truly commend them for their input on this matter and their respective stances are noted. However, will not be in a position to reproduce them verbatim but will consider them along when answering the issues framed. Quite unfortunate, Mr. Kipeche in his final closing submissions raised the issue of jurat of attestation of the 2nd defendant's witness statement but which objection was never raised and determined during the adoption of the 2nd defendant's written witness statement. At this stage, it is my considered opinion that, by DWI taking oath before her witness statement was adopted it suffices to cure any defect and as such will not have time to hear both parties on this point as it has been raised during final closing submissions. 12 So, I will not deal with a point that has come as an afterthought during final closing submissions against the defendant without affording her right to be heard. The noble task of this court now is to determine the merits or otherwise of this suit. In doing so, is high time now I answer the issues framed against the evidence on record. The first issue was couched that "whether the 2nd defendant has derogated and breached her financial repayment obligations that have been incurred by the plaintiff?." Mr. Kipeche on his part answered to the first issue in the affirmative and urged this court to find so. He gave reasons that, paragraph 9 and 10 of the plaint were not denied and under the provisions of Order VIII Rule 5 amounts to admission which is to be found in favour of the plaintiff, the 2nd defendant admitted to receive notice of meeting and that she send an email to Patel giving an apology through whatsapp message for being excused from attending the meeting. Lastly that she was notified of the resolution. On the totality of the above reasons, he urged this court to find the first issue in the affirmative. On the other part of the 2nd defendant, Mr. Kagilwa starting with standard of proof in civil case and guided by case law and section 110 of the Tanzania Evidence Act, [Cap 6 R.E 2019] concluded that the plaintiff was to prove his ' 13 case on balance of probabilities but which he failed. In answering the first issue, was his submissions that both PW1 and PW2 admitted that the plaintiff is private limited liability company and that the 2nd defendant shares are paid up shares and guided by section 15(2) of the Companies Act, [Cap 212 R.E.2002] once the plaintiff was incorporated it became body corporate and entity from its members and the only liability that can arise, is during winding up of the company. Having heard and considered the rivaling submissions by the learned advocates for parties, pleadings and evidence tendered by the plaintiff who wishes this court to find in her favour, I find this suit was not proved against the 2nd defendant. I will explain and give reason for

taking this stance. One, Companies operates through meetings and resolutions but none was tendered to show and prove that, indeed, the company resolved to borrow money from the persons and entities mentioned in exhibit P2. Two, DWI was director of the plaintiff and resigned in 2020 but exhibit P2 was created in 2019 but was not signed by her and no single witness of the plaintiff explained this omission. Three, no single document was tendered at least to prove that, indeed, the plaintiff is indebted to the individuals and entities to the plaintiff. The liability of companies should not be taken lightly and this 14 being specific claim, was to be proved by documentary evidence that actually exists. Four, as correctly argued by Mr. Kagilwa, and rightly so in my own opinion, legally once a company is incorporated and the shares by members are paid up as in this case for the 2nd defendant, the liability of the members can arise during winding up and not anyhow as provided for under section 15(2) of the Companies Act, 2002. This is not the case here. I can bold say this suit is not maintainable in law. Five, The argument by Mr. Kipeche that once, a party fails to reply to a particular paragraph in the plaint amounts to admission under Order VIII rule 5 and suffices to get a judgement is, in my own opinion, wrong and misconceived interpretation on the part of the learned advocate for the plaintiff of that provision because though not replied specifically but by necessary implication when the whole written statement of defence is read and considered, all claims by plaintiff were denied by the 2nd defendant and he urged this court to dismiss the entire suit with costs. More so, if there was an admission as Mr. Kipeche suggests why did he not move the court under Order XII rule 4 for judgement on admission? Failure to utilize the said provision was clear that the entire claims by the plaintiff against the 2nd defendant were disputed and the plaintiff had duty to prove 15 them as provided in the same rule. In this case, the plaintiff utterly failed to prove any. Six, the other reasons argued by Mr. Kipeche was that the 2nd respondent was notified of the meeting and was served by the resolution. With due respect to Mr. Kipeche this was not proved in this case and because no notice was tendered and no proof serving of the resolution was tendered proved. Seven, legally speaking a company cannot sue a member over its debts because if I allow this will undermine the principle in SOLOMON vs. SOLOMON [1897] AC 22 that a company is distinct legal personality from its shareholders upon registration. So, suing a shareholder compelling her to pay company's debts amounts to suing a third party to pay ones' debts and abuse of the court process on the part of the plaintiff. From the foregoing reasons, the first issue must be and is hereby answered in the negative that the 2nd defendant has not derogated and breached her financial obligations that have been incurred by the plaintiff. This takes this court to the second issue couched that "if the answer in the first issue is in the affirmative, whether the defendant is liable to pay and to what tune?" Given the answer in the first issue being negative as demonstrated above, the second issue will not detain this court 16 because its consideration depended much on the first issue answered in the affirmative. Therefore, in this suit, the second issue dies a natural death. The usual and last issue was couched that "to what reliefs parties are entitled to?" Kipeche urged this court to grant the reliefs as contained in the plaint against the 2nd defendant as prayed in the plaint. On the other part of the 2nd defendant, Mr. Kagilwa prayed that much as the first and second issues were to be found in the negative, the

instant suit be dismissed with costs. " Indeed, this suit given my findings in the issue must be and is hereby dismissed as I hereby do. The 2nd defendant shall have costs of this suit. It is so ordered. Dated at Dar es Salaam this 25th day of November, 2022. 17

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